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 In the Matter of Arbitration *
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 Between * Case No.:
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 OCSEA/AFSCME Local 11 * 34-03-(90-01-30)-0005-01-09
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 and *
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 The State of Ohio, Bureau * Before: Harry Graham
 of Workers' Compensation *
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Appearances: For OCSEA/AFSCME Local 11:

Joe Ealey
 Staff Representative
 OCSEA/AFSCME Local 11
 77 North Miller Rd.
 Fairlawn, OH. 44313

For The State of Ohio:

Wyatt McDowell
 Office of Collective Bargaining
 65 East State St., 16th Floor
 Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on May 24, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were not filed in this dispute and the record was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was the Grievant, Carl Eichelberger, discharged for just cause in accordance with Article 24 of the Collective Bargaining Agreement? If not, what should the remedy be?

Background: Many of the events which give rise to this proceeding are the subject of controversy between the parties. In December, 1989 the Grievant, Carl Eichelberger, was an employee of the Ohio Bureau of Workers' Compensation. In addition, at that time he was serving as President of the Local Union. He was engaged in a campaign for reelection. His opponent for the Presidency was James LaRocca. Running with Mr. LaRocca on the opposition slate was Demetrius Finney who was also employed by the Bureau of Workers' Compensation.

On December 7, 1989 some time after 3:00PM LaRocca and Finney appeared at the offices of the Bureau of Workers' Compensation in Cleveland, OH. Finney was going to introduce LaRocca, an employee of the Lottery Commission, to employees of the Bureau of Workers' Compensation. While he was doing that Eichelberger appeared on the scene. Initially he told LaRocca and Finney that they were conducting union politics on State time and were subjecting themselves and others to discipline. In due course, LaRocca left the scene via elevator. Eichelberger and Finney continued their dispute. While the precise details are subject to dispute, it is clear that Finney and Eichelberger engaged in a heated argument. During the course of that argument Finney moved from the area of the elevator bank to the area of the Director's office. He was followed by Eichelberger. When both were in front of the Director's office a fight ensued.

Subsequently the State discharged Mr. Eichelberger. No disciplinary action was taken against Mr. Finney. A grievance protesting that discharge was filed. It was properly processed through the machinery of the parties without resolution and they agree it is before the Arbitrator for determination on its merits.

Position of the Employer: The State asserts that Eichelberger was the aggressor in this situation. He attacked Finney and Finney defended himself. In the opinion of the State, this incident was provoked by Eichelberger. He was facing opposition for reelection as President of the Local Union. When his opponent, LaRocca, appeared on the scene, Eichelberger took it upon himself to function as a representative of management by directing them to leave the offices of the Bureau of Workers' Compensation. He had no authority to act in that fashion. Direction of employees is the responsibility of management, not members of the bargaining unit.

The State points out that it is approximately 150 feet from the elevator bank to the Director's office. Eichelberger followed Finney through the office suite for that distance, continuing the argument all the while. Eichelberger is large in stature. Finney is considerably smaller. It is not to be expected that Finney would be the aggressor under such circumstances. Finney fought back when he was attacked by

Eichelberger but his actions must be considered as self-defense, not aggression. Eichelberger provoked Finney by striking him in the chest with a copy of the Agreement. Finney told Eichelberger he did not want to fight. This was heard by employees in the area. Only after being backed into a corner did Finney strike out and then only to protect himself. Finney sought to escape Eichelberger. Only when all hope of escape was gone and he was being pummeled by Eichelberger did he act to defend himself according to the State. Finney experienced a broken hand as the result of the altercation. This represents a serious incident for which serious discipline is warranted the State alleges.

The Employer points out that Mr. Eichelberger is a veteran of eight years of service. During his tenure with the State his record indicates he has received a great deal of discipline. He has been counseled repeatedly, reprimanded, and has been suspended on more than one occasion. Given this record and his aggressive behavior on December 7, 1989 the State asserts the discharge in this situation meets the standard of just cause and should be upheld.

Position of the Union: The Union points out that no one saw the commencement of the fight between Eichelberger and Finney. Those witnesses who came forth saw only the end of the altercation as Finney and Eichelberger grappled. It is impossible to conclude that Eichelberger was the aggressor in

such circumstances. Finney received no discipline whatsoever for his role in this incident. Eichelberger was discharged. As no witnesses to the entire incident exist the Union insists that the State has no basis for discharging Eichelberger.

As the Union recounts the events of December 7, 1989 it was Finney, not Eichelberger, who was responsible for this incident. Finney took his running mate, LaRocca, to the offices of the Bureau of Workers' Compensation. They extended their stay past break time and were conducting union politics on work time. Eichelberger properly told them to cease out of concern that they and other Bureau employees were opening themselves to discipline.

Contrary to the assertion of the State that Eichelberger was the aggressor in this situation, the Union asserts that Finney took the lead. He swung first, hitting Eichelberger in the head and stunning him. Eichelberger, knowledgeable in Tai Kwon Do, kicked back at Finney but did not hit him. Finney closed with Eichelberger and secured him in a Full Nelson. When they were separated Eichelberger contacted the Ohio Highway Patrol and the Cleveland Police Department. By his actions Eichelberger demonstrated his clean hands in this situation. He should not be disciplined for his actions in the Union's opinion.

The Union views this incident as an attempt by the State

to rid itself of a Union advocate who was a thorn in its side. Eichelberger as Union President and long time union activist had been outspoken in his defense of members. This incident has been seized upon by the State to discharge him in the Union's eyes.

The Union portrays Eichelberger's accuser, Finney, as a liar. At the hearing testimony was received to the effect that subsequent to this incident Finney had bragged that he had gotten rid of Eichelberger and could do the same to others in the agency, including the Director in Cleveland. When questioned, Finney denied making such statements. Confronted with testimony to the contrary Finney continued his denial. In the face of testimony to the contrary, his denial is incredible according to the Union. Furthermore, Finney took the initiative in prompting the State to discharge Eichelberger. He secured written statements and provided them to management. If the Employer contemplated discipline, it should have acted on its own, not after prompting by one of the protagonists, Finney. As it has not been established that Eichelberger was the aggressor in this situation it must be concluded that the State lacked the requisite just cause to sustain his discharge. The Union urges an award reinstating the Grievant and making him whole.

Discussion: As is well known to these parties there regularly occurs in arbitration decisions a great deal of learned

discussion concerning the concept of the burden of proof. In discharge cases the Union argues that the Employer be held to a very high standard of proof: the standard of "beyond all reasonable doubt." The Employer normally argues for a lesser standard, such as "preponderance of the evidence" or "clear and convincing." In the final analysis these discussions are sterile. They obscure the fundamental nature of a discharge proceeding. In such cases the ultimate burden placed upon the Employer is production of sufficient evidence to convince the Arbitrator that the dischargee committed the act he is alleged to have committed and that the penalty for the act, discharge, is appropriate.

The basis for the discharge of Carl Eichelberger is the allegation that he was the aggressor in the fight involving himself and Demetrius Finney. Not one single solitary person was able to testify that Eichelberger took the initiative in the physical altercation that occurred on December 7, 1989. Testimony was received to the effect that Eichelberger was very agitated when he first came upon his political opponents, LaRocca and Finney, in the offices of the Bureau of Workers' Compensation. That Eichelberger was upset, that he may have remonstrated with them in forceful tones and urged their departure from the premises, does not constitute grounds for discharge.

At the hearing testimony was received to the effect that

when observers arrived at the scene of the fight they saw Finney holding Eichelberger in a Full Nelson. Eichelberger admits he directed kicks at Finney. Both Eichelberger and Finney indicate that the kicks did not land. Finney testified that Eichelberger struck him in the chest with the Labor Agreement and called him "boy." Eichelberger denies those events occurred. There is reason to view Finney's testimony with skepticism. At the hearing he denied that he had ever told the Director of the Bureau's Cleveland office that he "got rid of Carl (Eichelberger). I can get rid of you." Testimony from the Director was received that Finney had indeed made that remark. Obviously either Finney or Director Fisher is not telling the truth. Finney has incentive to be untruthfull. Fisher has none. Plainly put, Fisher's account is more credible than Finney's and is believed by this Arbitrator. Finney is not believed. Presuming that Finney was untruthfull in this aspect of his testimony, why should he be believed when he testified that Eichelberger was the aggressor? When a witness is caught out in a lie it taints his entire testimony. Even if Finney's account of his conversation with Fisher is credited, there remains the fact that no one witnessed the commencement of the Finney-Eichelberger fight. As Director Fisher testified, the aggressor in this incident was never determined. Eichelberger's account of the incident is as plausible as the

account given by Finney. A reed as slim as Finney's testimony is insufficient to support a discharge action. The State has not borne its burden of convincing the Arbitrator that the events of December 7, 1989 occurred as it alleges. They may have transpired as related by the State. Then again, they may have occurred as told by the Union. The most that may be said with any confidence is that a "not proven" conclusion is appropriate in this situation.

The State is correct to point out that the Grievant has a record replete with disciplinary entries. Existence of such a record coupled with Eichelberger's conduct towards LaRocca and Finney at the inception of this incident prompts the conclusion that discipline is warranted though this discipline must necessarily be short of the discharge penalty imposed by the State by virtue of the lack of proof of his physical aggression. Given the long history of discipline brought to this proceeding by the Grievant neither he nor the Union should expect a decision involving a make whole restoration to employment.

Award: Based upon the preceding discussion the grievance is SUSTAINED in part and DENIED in part. The Grievant is to be restored to employment with the State. The discharge in question in this proceeding is to be converted to a suspension of twenty (20) work days. The Grievant is to be paid the difference between what he would have earned and

what he did earn but for his wrongful discharge less the pay due for the twenty (20) work day suspension. Such pay is to be made at the straight time rate. The Grievant is to provide to the State records of any payments made to him from the Unemployment Compensation system of the State and records of any interim earnings. Any payments from Unemployment Compensation and interim earnings may be used to offset the back pay obligation of the State. The personnel file of the Grievant is to be altered to reflect the suspension. Reference to the discharge under review in this proceeding is to be expunged from the Grievant's personnel file.

Signed and dated this 8th day of June, 1990 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator